Office-Supreme Court, U.S.
FILED
NOV 30 1961
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 302

THOMAS J. HYLAND, THEODORE N. SCHMIDT, CHARLES A. ROSS, EMERSON LEE McCONNELL, STEVE GEORGE TOMASKO, ORA E. O'BRIEN, and FEDERAL EMPLOYEES EQUALITY ASSOCIATION,

Petitioners,

v.

ROBERT M. WATSON, BERTRAM M. ROSE, GENERAL E. W. RAWLINGS, and BRIG. GEN. STANLEY T. WRAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

WILLIAM R. COEN,
WHITE, ZIMMERMAN & COEN,
214 Talbott Tower,
Dayton 2, Ohio,
Counsel for Petitioners.

November 29, 1961

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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PETITION FOR REHEARING

Pursuant to Rule 58 (2) of this Court, Petitioners respectfully pray for a rehearing of the Order of October 16, 1961, denying Petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. By timely order, Petitioners were granted to December 1, 1961, to file this petition for rehearing.

GROUNDS FOR REHEARING

The grounds for rehearing are that substantial intervening circumstances have occurred and that other substantial grounds not previously presented are now available to petitioners.

WHITE HOUSE CONFERENCE

Specifically, on October 27, 1961, certain of petitioners met at the White House with Mr. Lee C. White, Administrative Counsel to the President. Also present was a representative of the Civil Service Commission. A two hour discussion was held and further telephone conferences since. The Administration is interested in petitioners' attack on the President's announced policy of "Equal Job Opportunity" (without DISCRIMINATION). The anxiety of the Berlin situation makes it even more important that a new and nonarbitrary statute replace the current (1944) law.

Two and one half million civilian employees of the Government are affected by this case. It is highly deserving of suggestions from the White House and it is completely deserving of a hearing before this Court.

Perhaps even more important than the interest of the White House is the fact that an important ground exists for granting certiorari (which ground not heretofore presented).

THREE JUDGE COURTS—IMPROBABILITY OF CONFLICTING DECISIONS

In *Schriber* v. *Cleveland Trust Co.*, on rehearing, certiorari was granted; Mr. Justice Stone stated, at 305 U. S. 47, page 50:

> "We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere

> *with a resulting conflict of decision* was *improbable* because of the concentration of the automobile industry in the Sixth Circuit." (Emphasis supplied.)

See also, *Federal Trade Commission* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 57, 58:

> "We granted both petitions because of the fundamental significance of these issues in the application of an important Act of Congress.

The Court determination of veteran in the case of *Mitchell* v. *Cobert*, 383 U. S. 411, is not being applied in relation to another Act of Congress, the Veterans Preference Law. A *conflict* exists as to the *application* of an important Act of Congress. And there can be no doubt but that the Veterans Preference Act *was* an important Act of Congress. It's purpose of rehabilitation of the returning veteran is now questioned by this case. Any law directly affecting this many employees is important, its *continuance* ad infinitum [illegible] should be reviewed by this Court. NOW is the time to grant this review! A fair and just appraisal of this case requires more than the summary dismissal of petitioners' arguments, both on the merits AND on the PROCEDURE FOR APPEAL FROM A DENIAL OF A THREE JUDGE COURT.

The structure of the Three Judge Court system and appeal therefrom is a matter recently before this Court in District of Columbia matters, *Schneider* v. *Herter*, 283 F. 2d 368. This was a decision by J. Fahy, Acting Chief Judge wherein the Court did not pass on the proper means of review from the denial of a Three Judge Court. The Court said, (p. 370):

> "The ordinary method of correcting trial court error is by appeal under applicable statutory provisions; and when an extraordinary method is appropriate it is by application to an appellate court, either the Supreme

> Court or the Court of Appeals, I do not in the abstract decide which, for a writ."

The Court cited the Comment in 27 University of Chicago Law Review 555 (1960), entitled "The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism. The author stated, at page 546:

> "There are few, if any, cases of "vast public moment"; nor is any nationwide legislative policy being frustrated in the district courts."

The Comment then proceeds to state that the most far reaching three-judge decisions of the past decade have been those involving school segregation. The author then points out the problem of having a single district judge pass on what is now clearly a substantial Constitutional question:

> "The courts have been in disagreement as to whether the segregation issue raises a sufficiently 'substantial and unsettled' constitutional question to bring it within the Three-Judge Acts."

And in footnote 49 (p. 566):

> "The Supreme Court has continued to avoid settling the question either way."

The reason for the foregoing discussion of the unusual appeal from denial of Three-Judge Courts is to point out the IMPORTANCE of granting certiorari in this case. It is all important that this Court spell out what the proper review is—both from a procedural standpoint as well as on the merits. Should a DISTRICT JUDGE sitting in Dayton, Ohio, citing another dismissal for lack of a substantial constitutional question in the DISTRICT OF COLUMBIA MAY FINALLY determine petitioners' rights? The EFFECT of the decision of Judge Weinman was to bring to an effective appeal of his decision to date.

Petitioners claim that their attack on the constitutionality of a federal statute has been determined on the MERITS by District Judge Weinman. Is this a matter for a Writ of Mandamus to order the convening of a three-judge court? [illegible] appealed the decision of Judge Weinman to the Ninth Circuit and that Court too chose to follow a District Court decision (*White v. Wirtz*, 252 F. 2d 868) denying petitioners their right to a three-judge court. It appears that by this Court denying certiorari that [illegible] district judge determines what is a substantial question of law that now been [illegible].

> [illegible] claim "obviously without merit," [illegible] Supreme Court by previous decisions [illegible] of the subject, or
>
> [illegible] the question previously been raised and settled in any other case, no matter how weak the case may be, even though the Supreme Court did not review the case.

[illegible] contend this is not the intent nor the [illegible] of Judge Statute. Petitioners contend further that the District Court did not find petitioners' claims to be "obviously without merit." If there is any doubt [illegible] petitioners invite an inquiry be made to Judge Weinman. Rather, petitioners are confident that Judge Weinman [illegible] decision [illegible] "obviously without merit").

[illegible] this Petition for [illegible] Judge [illegible] the Supreme Court, [illegible] matter [illegible] Judge [illegible] District Judge [illegible] to the Higher Court [illegible] Motion [illegible] of Judge [illegible]

White matter. And such an ending to this case is not to the best interest of the federal service nor is it a solution to the problems besetting litigants attacking a federal statute as being unconstitutional. For when, if ever, will any more conflict arise than we have at the present time? Circuit Judge Prettyman stated at page 870 of the *White* decision:

> "I think a substantial constitutional question is raised. I would remand for consideration by a statutory Three-Judge District Court." *White* v. *Gates*, 253 F. 2d 868, 870.

In view of the problems of ever reversing a trial judge upon his refusal to grant a three judge court and in view of the merits of this case, petitioners believe that it is incumbent upon this Court to hear this matter. How else can a litigant pursue his right to a three judge court? The purpose of the statute was not to make it impossible to obtain a three judge court; the end result, however, if certiorari is not granted in his case, will be that the long standing rule of law that a denial of certiorari is not a ruling on the merits will be obviated and reduced to nothing.

CONCLUSION

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

William R. Coen,
White, Zimmerman & Coen,
214 Talbott Tower,
Dayton 2, Ohio,
Counsel for Petitioners.

November 29, 1961

CERTIFICATE OF COUNSEL

I, WILLIAM R. COEN, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

s/ WILLIAM R. COEN,
WILLIAM R. COEN,
Counsel for Petitioners.